LAW OFFICES OF
PAUL, HASTINGS, JANOFSKY & WALKER LLP
A LIMITED LIABILITY PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

600 PEACHTREE ST., N.E., STE. 2400
ATLANTA, GEORGIA 30308-2222
TELEPHONE (404) 815-2400

695 TOWN CENTER DRIVE
COSTA MESA, CALIFORNIA 92626-1924
TELEPHONE (714) 668-6200

THE INTERNATIONAL FINANCIAL CENTRE
OLD BROAD STREET
LONDON EC2N 1HQ
TELEPHONE 44 (171) 562-4000

555 SOUTH FLOWER STREET
LOS ANGELES, CALIFORNIA 90071-2371
TELEPHONE (213) 683-6000

1299 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20004-2400
TELEPHONE (202) 508-9500
FACSIMILE (202) 508-9700
INTERNET www.phjw.com

ROBERT P. HASTINGS (1910-1996)
COUNSEL
LEE G. PAUL
LEONARD S. JANOFSKY
CHARLES M. WALKER

399 PARK AVENUE
NEW YORK, NEW YORK 10022-4697
TELEPHONE (212) 318-6000

345 CALIFORNIA STREET
SAN FRANCISCO, CALIFORNIA 94104-2635
TELEPHONE (415) 835-1600

1055 WASHINGTON BOULEVARD
STAMFORD, CONNECTICUT 06901-2217
TELEPHONE (203) 961-7400

ARK MORI BUILDING
12-32, AKASAKA 1-CHOME
MINATO-KU, TOKYO 107, JAPAN
TELEPHONE (03) 3586-4711

May 26, 1999

WRITER'S DIRECT ACCESS
(202) 508-9530

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VIA HAND DELIVERY

Ms. Magalie R. Salas
Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
Room TW-A325, 12th Street Lobby
Washington, D.C. 20554

RE: Comments of Metro One Telecommunications, Inc. in CC Docket No. 96-98: In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Second Notice of Proposed Rulemaking

Dear Ms. Salas:

On behalf of Metro One Telecommunications, Inc. ("Metro One"), we submit herewith for filing an original and twelve (12) copies of Comments in the above-referenced proceeding.

We also enclose an extra copy of this transmittal letter that is to be date-stamped and returned in the envelope provided. Should any questions arise regarding this submission, please contact Metro One's undersigned legal counsel.

Respectfully submitted,

Michelle W. Cohen
for PAUL, HASTINGS, JANOFSKY & WALKER LLP

Enclosures

cc: Janice M. Myles (FCC)
ITS

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	

COMMENTS OF METRO ONE TELECOMMUNICATIONS, INC.

Its Attorneys

Michelle W. Cohen
Paul, Hastings, Janofsky & Walker LLP
1299 Pennsylvania Ave, N.W.
Tenth Floor
Washington, D.C. 20004
(202) 508-9500

Lonn Beedy
Metro One Telecommunications, Inc.
8405 S.W. Nimbus Avenue
Beaverton, OR 97008-7159
(503) 643-9500

May 26, 1999

SUMMARY

Metro One Telecommunications, Inc. ("Metro One"), a certified telecommunications carrier and a competing provider of directory assistance ("DA") and other services, urges the Commission to reaffirm its national standards governing network elements. These standards are essential because competition in local markets remains limited a full three years after enactment of the 1996 Act. Metro One has experienced several instances of ILECs utilizing state-by-state interconnection and arbitration processes to delay meeting the requirements of the 1996 Act. Thus, national, uniform standards remain critical in fostering competition by balancing ILECs' home field "super" advantage and combating ILECs' delay tactics. Moreover, the 1996 Act does not authorize states to determine, in the first instance, that certain unbundled networks are not required. The authority to establish and maintain minimum network elements rests solely with the Commission.

The Commission must retain access to the ILECs' directory listings and DA databases as one of the delineated national unbundled network elements. The Commission should also amend its definition of DA in section 51.310(g) to encompass access to DA listings in batch format via magnetic tape or other electronic data means. The Commission previously recognized that a customer's carrier selection may be determined by the disparities a customer perceives between an ILEC's DA services and those of competing carriers. Metro One's comments establish that the ILECs are the *only* source of complete, reliable DA listings and databases. DA data from third party compilers is out-of-date as soon as it is made available to carriers, and thus is unacceptably inferior in a market where consumers justifiably demand speed and accuracy in obtaining DA listings. If consumers are unable to obtain reliable information at reasonable costs from an alternative provider, they will retreat to the one

carrier who can serve their needs -- the ILEC. This scenario would clearly defeat the central goal of the 1996 Act of opening telecommunications markets to full, fair competition.

Metro One implores the Commission to interpret the statutory term "impair" in Section 251(d)(2) in a manner consistent with Commission precedent in interpreting that term in the context of Section 207 of the 1996 Act. Specifically, in that context, the Commission already rejected interpreting "impair" narrowly as only covering a restriction that "prevents" access -- "because that definition would not properly implement Congress' objective of promoting competition." The same reasoning is fully applicable in the network elements context. The Commission should interpret the term "impair" as applying where: (a) the ILEC has unreasonably delayed or prevented the competing carrier from obtaining a network element; (b) the element is only available at an unreasonable cost; or (c) the competing carrier cannot obtain from an alternative source the equivalent -- in quality and cost -- of the ILEC's network element.

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COMMENTS OF METRO ONE TELECOMMUNICATIONS, INC.

Metro One Telecommunications, Inc. ("Metro One"), by its attorneys and pursuant to Sections 1.415 and 1.419 of the Federal Communications Commission's (the "Commission") Rules,[1/] hereby submits its comments on the *Second Further Notice of Proposed Rulemaking* (the "*Notice*")[2/] adopted in the captioned proceeding. The following is respectfully shown:

I. INTRODUCTION AND BACKGROUND

Metro One is a national provider of enhanced information and telecommunications services. It is certified to provide directory assistance ("DA") and toll services in Oregon, has been assigned a Carrier Identification Code and has obtained an Operating Company Number from the National Exchange Carrier Association. Metro One's services currently include the provision of Enhanced Directory Assistance ("EDA"), with live operator-assisted call completion, to end-users of various national and regional cellular and personal communications services ("PCS") telecommunications companies. Metro One also offers its services to landline based carriers, including competitive local exchange carriers ("CLECs"). Metro One's EDA services enable end-users to obtain "traditional" DA (*i.e.*, telephone numbers of individuals and entities), as

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1/ 47 C.F.R. §§ 1.415, 1.419.

2/ FCC 99-70, released April 16, 1999.

well as a host of enhanced services such as movie listings, information on local events (*e.g.*, concerts and sporting events), geographic directions, weather warnings and school closings.

Metro One is headquartered in Beaverton, Oregon and has 20 DA call centers located throughout the United States. Metro One has built multiple call centers to better serve its customers with operators who can provide in-depth knowledge of local and regional information. One or more of Metro One's DA call centers are located in each of the Regional Bell Operating Company ("RBOC") operating areas.

As a "telecommunications carrier" under the Telecommunications Act of 1996 (the "1996 Act"), Metro One is entitled to request from the RBOCs and other incumbent local exchange carriers ("ILECs"), "nondiscriminatory access to network elements on an unbundled basis . . . on rates, terms, and conditions that are just, reasonable and nondiscriminatory . . . ."[3/] Metro One's primary requirement for interconnection with RBOCs and other local exchange carriers ("LECs") is gaining access to the DA listings of these LECs on a non-discriminatory basis, in readily accessible electronic formats and at rates provided for in the 1996 Act.

Metro One and other competitive DA providers offer end-users and competitive carriers an alternative to the ILECs' DA services. Competitive DA providers focus on customer service and attractive pricing and have competed with the ILECs by developing innovative features and services. Such innovative services created by a competitive DA provider include: national DA provided through a single number; enhanced information services; the ability to automatically be returned to an operator in the event that you are connected to a busy ring or if there is no answer; and the ability to obtain driving directions from a DA operator. Alternative DA providers have stimulated

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3/ 47 U.S.C. § 251(c)(3).

competition from ILECs in the DA market. For instance, many of the RBOCs, responding to competition in the DA market, have recently replicated DA improvements, such as national DA and EDA services. Competition in the DA business also has spurred ILECs' improvements in customer service.

The most critical component in providing reliable, dependable and competitive DA is being able to access accurate data. Without such accurate data, customers will receive either incorrect listings or no listings. As the dominant providers of local exchange services, the ILECs have a unique advantage in the DA business, because they have the *only* complete and reliable DA databases. Metro One and other DA providers have no viable choices in obtaining the subscriber listings crucial to the DA business. Third party DA data is highly inferior and cannot be relied on if a provider is to remain competitive.[4/]

Metro One's experience with LEC DA data and DA data obtained from third party data compilers has shown that the ILEC data is approximately 95% accurate while third party data is less than 80% accurate. This is because the source of third party compiled DA data, for the most part, is from printed LEC telephone directories which are, in turn, sent to low labor cost countries, such as China, to be scanned. The result is that the data only contains those listings which were included in the printed directories, which by the time of printing is very much out-of-date. In fact, because of the time it takes to compile and print telephone directories, the information in the directory is from

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4/ *See, e.g., Ex Parte Comments of INFONXX, Inc.,* CC Docket No. 97-172 at 4 (filed May 20, 1999) ("U S WEST has access to fully accurate subscriber information as a result of the fact that it is the dominant LEC in its region"); *see also* Comments of INFONXX, Inc., CC Dockets No. 96-115 and 96-221, at 5, 7 (filed Mar.18,1999) (stating that ILECs "have always enjoyed an unfair advantage due to their monopoly position in the local exchange [market]," and noting that the ILECs enjoy a cost advantage of approximately 60% per call. INFONXX also established that database inaccuracies due to inferior access to subscriber listing information result in approximately 40 million wrong telephone numbers per year).

three to six months old by the time the directory is printed. Thus, by the time the directory is scanned and the data is prepared by the compilers, the data is likely more than a year old. In contrast, the ILEC DA database has "next day" new and deleted listings.

DA customers (who traditionally have been the ILECs' customers) are used to the ILECs' accurate DA databases. These customers expect to obtain current listing information when they call any DA provider. In a competitive market, if they are unable to get reliable listings from an alternative provider, they will likely choose as their DA service provider (and most likely, their local exchange service provider) the entity that has accurate DA listings -- the ILEC. Such a scenario completely thwarts the central goal of the 1996 Act to open telecommunications markets to full and fair competition.

The Commission has recognized that nondiscriminatory access to the ILECs' DA databases is critical to competing carriers. In particular, "customer perception can be shaped by perceived disparities in the quality of access to [DA] services provided by a competing carrier and an ILEC."[5/] As new carriers attempt to compete with the ILECs, access to the ILECs' DA databases as unbundled network elements pursuant to Section 251(c)(3) is crucial to furthering Congress's goal of "accelerat[ing] rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."[6/]

5/ *In the Matter of Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance, Notice of Proposed Rulemaking*, 13 FCC Rcd. 12817, 12857 (1998).

6/ S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 113 (1996) (Joint Explanatory Statement of the Committee of Conference).

II. DISCUSSION

Section 251(c)(3) of the 1996 Act mandates that ILECs provide to requesting telecommunications carriers "nondiscriminatory access to network elements on an unbundled basis . . . ." In the *Notice*, the Commission reiterates that "[t]he ability of requesting carriers to use unbundled network elements . . . is integral to achieving Congress' objective of promoting rapid competition in the local telecommunications market." [7/] Metro One urges the Commission to quickly reaffirm, consistent with the United States. Supreme Court's ruling in *AT&T Corp. v. Iowa Utils. Bd.*, minimum national unbundling rules providing competitors access to the ILECs' network elements, including DA listings and DA databases, pursuant to Section 251(c)(3) of the 1996 Act.

A. National Unbundling Requirements Are Critical to Furthering Congress's "National Policy Framework"

Metro One agrees with the Commission that the United States Supreme Court's decision in *AT&T Corp. v. Iowa Utils. Bd.* does not preclude the Commission from establishing minimum national unbundling requirements.[8/] Rather, the Supreme Court held that the Commission's application of the "network element" standard -- which is a national standard -- is "eminently reasonable."[9/] The Supreme Court focused instead on what it deemed the Commission's lack of consideration of "the availability of elements outside the incumbent's network" and of the Commission's interpretation of the "necessary" and "impair" standards in Section 251(d)(2).[10/] The Supreme Court directed

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7/ *Notice* ¶ 2.

8/ *See Notice* ¶ 14.

9/ *AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721, 734 (1999).

10/ 119 S. Ct. at 735.

the Commission to reconsider these items. However, nowhere in the Court's decision did it indicate that the Commission's establishment of national standards was impermissible.

The *Notice* seeks comment on the Commission's tentative conclusion to continue to identify a minimum set of network elements that must be unbundled on a nationwide basis.[11/] Metro One believes that it is imperative that the Commission establish national standards governing network elements. Competition in the local telecommunications and DA market continues to be limited a full three years after enactment of the 1996 Act. A major reason for the stunted competition in the industry is the ability of the ILECs, in the absence of clear national standards, to use state-by-state interconnection agreements and the resultant arbitration process to delay satisfying the requirements of the 1996 Act.

Specifically, in Metro One's experience, even if ILECs know that the position they are taking in refusing to provide network elements is contrary to the 1996 Act, the ILECs can delay resolving any issue for significant periods of time. As a result, many issues have to be arbitrated in each state, resulting in potentially 50 different results. This puts a very significant financial and manpower burden on new competitors at a time when they can least afford such a drain on fiscal and human resources. Over the last three years, the ILECs have clearly demonstrated that without clearly delineated, enforced national standards, the result can easily be 50 different standards, or in some cases, no standards. As the U.S. Department of Justice previously asserted, national unbundling standards are critical because there exists "no basis in economic theory or in experience to expect incumbent monopolists to quickly negotiate arrangements to facilitate disciplining entry by would-be competitors, absent

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11/ *See Notice* ¶ 14.

clear legal requirements to do."[12/] Thus, as the Commission previously found in the *Interconnection Decision*, national rules "will promote competition by making the bargaining strength of potential competitors, including small entities, more equal."[13/]

The Commission also requests comment on whether "geographic variations in the availability of elements outside the incumbent LEC's network is relevant to a decision to impose minimum national unbundling requirements."[14/] The Commission previously determined in the *Interconnection Decision* that "any differences that may exist among states are not sufficiently great to overcome the procompetitive benefits that would result from establishing a minimum set of binding national rules."[15/] The existence of such geographic variations continues to be irrelevant to a decision to impose national unbundling requirements. While there may be some insignificant variations, they do not justify abandoning the crucial national standards. This is especially true in the DA market, where ILECs -- from coast to coast -- always have superior, non-replicable DA listings and databases. This competitive blockade is exacerbated by the continuing mergers in the telecommunications industry, since RBOCs obtain even more superior databases once they acquire competing ILECs.

12/ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *First Report and Order*, 11 FCC Rcd. 15499, ¶ 241 (1996) (*"Interconnection Decision"*), *Order on Reconsideration*, 11 FCC Rcd. 13042 (1996), *vacated in part sub nom. Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part and rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999).

13/ *Id.* ¶ 245.

14/ *Notice* ¶ 14.

15/ *Interconnection Decision* ¶ 244.

The Commission seeks comment on the interpretation of the "necessary" and "impair" standard in Section 251(d)(2), recognizing that it must interpret this term more than three years after passage of the 1996 Act.[16/] However, little has changed in the local telecommunications market since the passage of the 1996 Act. The U.S. Supreme Court recognized in *AT&T Corp. v. Iowa Utils. Bd.* that "[f]oremost among [the ILECs'] duties is the LEC's obligation . . . to share its network with competitors."[17/] Despite the fact that Congress imposed this obligation in 1996, ILECs regularly continue to deny competitors such as Metro One access to their network elements. The ability of competitors to provide competitive services continues to be impaired by the ILECs' failure to provide network elements.

The experience of Metro One in seeking to obtain the unbundled network element of DA listings is representative of the ramifications of the practices being employed by the ILECs. For instance, Bell Atlantic refuses to provide DA listings to competing telecommunications providers in batch format at TELRIC prices unless ordered to do so by a state public utilities commission. The New York commission has ordered Bell Atlantic (NY Telephone) to provide New York DA listings in batch format at a TELRIC based price of $0.004 for the initial listings and a price of $0.0076 for updates to all DA providers based on an estimate of 10,000,000 initial listings and 10,000,000 updates per year.[18/] For the remainder of the Bell Atlantic states, Bell Atlantic offers to competing telecommunications providers an on-line "dip" service where a DA provider can access the Bell Atlantic database through a Bell Atlantic dictated

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16/ *Notice* ¶ 14.

17/ *AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. at 726.

18/ *See NY PSC Opinion and Order, 99-4,* issued February 22, 1999.

interface and search for listings. The effective cost to Metro One of this service is approximately $0.15 per found listing.

In the *Interconnection Decision*, the Commission adopted national standards to prevent LECs from delaying providing access to unbundled network elements and to reduce the likelihood of litigation and the costs associated with such litigation, among other reasons.[19/] Metro One's experiences as a competitive telecommunications provider demonstrate that national standards remain critical to fostering competition and to combating ILECs' delay tactics.

B. DA Listings Should Not be Considered Proprietary

In the *Interconnection Decision*, the Commission observed that ILECs "generally did not claim a proprietary interest in their directory assistance databases," and that proprietary concerns had not been identified regarding unbundling access to directory assistance.[20/] Applying the "necessary" and "impair" standards, the Commission concluded that access to the systems supporting DA "is necessary for new entrants to provide competing local exchange services."[21/] The Commission further found that, as access to directory assistance is "critical to the provision of local service," competitors' ability to provide service "would be significantly impaired if they did not have access to ILECs'. . . directory assistance."[22/]

19/ *Interconnection Decision* ¶ 242.

20/ *Interconnection Decision* ¶ 539.

21/ *Id.*

22/ *Id.* ¶ 540.

The major network element that might conceivably be considered "proprietary" to which access by Metro One is necessary are the DA listings that are classified as "unpublished" in the ILECs' DA databases. These are listings that the telephone subscriber does not want "published" in a directory or given out by a DA provider. The use of these listings in the provision of DA service is to be able to identify the customers that want their numbers to be unpublished. By having this information, a DA provider can advise the requester, after a reasonable search, that the number that they are seeking is a "non-published" number and the DA operator cannot provide a telephone number or address. Without this information, the DA provider can only respond, after a lengthy search, that they do not have the listing requested. The DA customer receives significantly better service if the customer knows that the number is a non-published number, rather than simply having a DA operator return "empty handed" without a listing.

Several ILECs, with the support of some of their state commissions, refuse to make these listings available to competitive providers on the basis that the information is confidential, *even though the ILEC itself uses the listings in the provision of their own DA to their DA customers*. In the *Interconnection Decision,* the Commission indicated that ILECs should not be required to provide access to unlisted or unpublished telephone numbers, consistent with Section 222 of the Communications Act.[23/] However, in light of the ILECs' inherent advantages in being the sole entity with access to that information, Metro One urges the Commission to reconsider its earlier limitation. While it may be appropriate for the ILEC to honor the request not to give out the "non-published" customer's name and address, providing the name of the customer to competitive DA providers without the telephone number or address and with a notation that the listing is

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23/ *Interconnection Decision* ¶ 535.

"non-published" certainly could not be objectionable, since this would not disclose confidential or proprietary information and would allow the competitive provider to compete on an even playing field with the LEC.

C. In Interpreting the Term "Impair" in Section 251(d)(2)(B), the Commission Should Consider the New Entrant's Ability to Offer Telecommunications Service in a Competitive Manner

The *Notice* seeks comment on the meaning of the term "impair."[24/] Metro One believes that, consistent with the pro-competitive goals of the 1996 Act which the Commission and state regulators are still trying to achieve, the term "impair" should be interpreted to consider, at a minimum, whether a competitive telecommunications provider's ability to offer services in a competitive manner is inhibited by a lack of access to the requested element. The Commission has interpreted the 1996 Act's statutory term "impair" in this manner in other contexts to further the objective of promoting competition. Specifically, the Commission interpreted the term "impair" in implementing Section 207 of the 1996 Act which mandates that the Commission issue rules to eliminate restrictions "that *impair* a viewer's ability to receive video services . . . designed for over-the-air reception."[25/]

In defining the term "impair" in the Section 207 proceeding, the Commission explicitly "reject[ed] the interpretation that impair means prevent because that definition would not properly implement Congress' objective of promoting competition."[26/] Rather, the Commission deemed the situation in which a restriction "impairs" a viewer's ability to include restrictions which: (a) "unreasonably delays or prevents" the installation,

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24/ *Notice* ¶ 17.

25/ *See* Section 207 of the Telecommunications Act of 1996 (emphasis added).

26/ *Implementation of Section 207 of the Telecommunications Act of 1996*, 13 FCC Rcd. 23874, ¶ 79 (1998).

maintenance, or use of a device; (b) "unreasonably increases the cost" of installation, maintenance, or use of a device; or (c) "precludes reception of an acceptable quality signal."[27/]

A similar interpretation (with minor variations) of the term "impair" in the context of Section 251(d)(2)(B) would be consistent with and supported by existing precedent. Thus, a competing carrier's ability to provide services could be deemed to be "impaired" by an ILEC's failure to provide access to network elements where: (a) the ILEC has unreasonably delayed or prevented the competing carrier from obtaining the network element; (b) the element is only available at an unreasonable cost; or (c) the competing carrier cannot obtain a network element elsewhere of an acceptable quality.

D. Criteria for Determining "Necessary" and "Impair" Standards Should Not be Based on The Essential Facilities Doctrine, but as to DA Listings, That Standard is Met

In Section F of the *Notice,* the Commission requests comments on the factors or criteria that it should adopt in determining the "necessary" and "impair" standards.

1. DA Listings are Essential Facilities

ILECs asserted in their arguments before the Supreme Court that Section 251(d)(2) codifies a standard similar to the "essential facilities" doctrine, as defined in antitrust jurisprudence. The *Notice* asks parties to describe this doctrine and how it should be applied, if at all, to the determination of which network elements ILECs must provide on an unbundled basis pursuant to Sections 251(c)(3) and 251(d)(2).

Under the essential facilities doctrine, "a business or group of businesses which controls a scarce facility has an obligation to give competitors reasonable access to

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27/ *Id.*

it."[28/] A facility is considered "essential" "where it is vital to competitive viability."[29/] The standard for ascertaining whether a facility is essential or not depends on whether the denial of access to the alleged essential facility imposes a "severe handicap" on competitors.[30/]

In the situation involving the element of DA listings, if the essential facilities doctrine were the standard, the standard would be met. ILECs control the scare resource of DA listings and the DA database. Competitors like Metro One cannot "effectively compete in the relevant market" without "reasonable access" to the listings and databases. As demonstrated above, due to the ILECs' sole possession of accurate and complete DA databases, it would be impossible for competitive telecommunications providers to survive without being able to acquire the DA listings of the ILECs on terms and conditions set forth in Section 251(c)(3) of the 1996 Act. There is truly no alternative source at any price. This has become especially clear now that the ILECs themselves have elected to compete aggressively, using the 411 code and their DA listings to provide nationwide DA as well as, in certain instances, EDA services.

However, Metro One does not believe that the 1996 Act requires that facilities be considered "essential" under the essential facilities doctrine to be provided on an unbundled basis pursuant to Sections 251(c)(3) and 251(d)(2). The Supreme Court

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28/ *Byars v. Bluff City News Co., Inc.*, 609 F.2d 843, 856 (6th Cir. 1979).

29/ *Colonial Penn Group, Inc. v. American Ass'n. of Retired Persons*, 698 F. Supp. 69, 73 (E.D. Pa. 1988).

30/ *Twin Laboratories, Inc. v. Weider Health & Fitness*, 900 F.2d 566, 568 (2d Cir. 1990).

recognized that "some other standard" may provide "an equivalent or better criterion for the limitation upon network-element availability that the statute has in mind."[31/]

Based upon Congress's goal of promoting competition in telecommunications markets, an alternative approach could be whether the ILECs' failure to provide a network element would likely deny an efficient competitor a meaningful opportunity to compete. This approach is consistent with the Commission's earlier conclusion that "providing new entrants, including small entities, with a meaningful opportunity to compete is a necessary precondition to obtaining the benefits that the opening of local exchange markets to competition is designed to achieve.[32/]

2. The Mere Existence of an Alternative Does Not Remove the Necessity of a Network Element

The Supreme Court stated that in determining the list of elements that ILECs must provide on an unbundled basis pursuant to Sections 251(c)(3) and 251(d)(2) of the 1996 Act, the Commission must take into consideration the availability of network elements outside the incumbent's network. The *Notice* seeks comment on how the Commission should consider the availability of network elements outside of the incumbent's network, including potential alternative sources of network elements from other competing carriers. Regarding the costs of utilizing an alternative source, the Supreme Court found insufficient the Commission's "assumption that *any* increase in cost" would impair a requesting carrier's ability to provide service.[33/]

There are several components to "costs" that must be considered in determining what the real costs of a network element is to a new entrant. There are the

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31/ *AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. at 734.

32/ *Interconnection Decision* ¶ 315.

33/ *AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. at 734.

direct costs of acquiring the network element itself from the alternate source. There are also the indirect costs resulting from acquiring the element such as installing, integrating and operating the element in the new entrant's network.

Metro One urges the Commission to find that the mere existence of an alternative does not remove the necessity for ILEC provisioning of certain network elements. Rather, if there is an alternative, it should be -- at a minimum -- closely equal in quality to the ILEC's element, and available at a reasonable cost. The DA listings area presents an excellent example of a situation where the existence of an alternative is inadequate and where the ILECs' network element is critical. In the case of the network element of DA listings, some ILECs claim that DA listings are also available from third party data providers. It is true that third party data providers provide a form of listings that could allow a new entrant to provide poor quality directory assistance. In all cases of which Metro One is aware, even these poor quality listings are considerably more expensive than TELRIC priced ILEC DA listings.

However, as important as the costs of the listings, the detrimental costs that inaccurate and incomplete listings cause to the DA provider are even more significant. There are three basic components to a DA operation. They are: 1) the DA database, 2) the DA systems platform and search engine, and 3) the individuals who operate the business. To be able to employ an efficient DA operation, provide the quality of service that will retain customers and make a profit, it is critical to maximize the efficiency of each of these components. The objective of the business is to provide the listing(s) the customer is requesting as quickly as possible and using as little of the operator's time as possible.

The difference between being profitable or not is measured in seconds or in fractions of seconds in average search time. The time the operator spends searching is

critical because the human component is by far the most expensive cost element. Searching for a listing that is not in the database or is incorrect in the database will result in search times that are several times greater than searching for a listing that is correctly in the database. The average search time for a listing which is in the database should be less than 30 seconds. The average time it takes to search for and determine that the requested listing is not in the database could easily exceed 90 seconds.

There are at least two practical results from using third party compiled DA listings. First, and foremost, is that the quality of service provided to the DA customer will be inferior. Second, the cost of providing the inferior service will be significantly higher than it would be to provide the quality of service expected by former ILEC customers using ILEC-provided DA databases. For a new entrant to compete effectively in providing DA (and local telecommunications services), they must be able to compete with the ILECs in the cost and the quality of the DA service they are able to provide.

This necessity to "even the playing field" has become even more obvious and more important in the last several months. The LECs have demonstrated with their National Directory Assistance (NDA) service using the 411 dialing code that they intend to dominate the DA business as they have the telecommunications business in the past. Without being able to obtain the DA listings of the LECs in batch format at TELRIC prices and otherwise under the same terms and conditions upon which the ILECs provide the listings to themselves, it will be *impossible* for Metro One and other telecommunications providers to compete with the ILECs in the provision of DA and local telecommunications services.

E. Access to DA Databases and Listings as Network Elements Remains Warranted

The *Notice* requests comment on the proposed standards and criteria, as well as other proposed standards, to the loop and the other six network elements previously identified in the *Interconnection Decision.* The Commission also asks commenters to provide factual information comparing the quality of alternatives to those network elements that they request to be unbundled.[34/]

Metro One urges the Commission to retain directory assistance as an unbundled network element. The Commission has previously recognized that directory assistance is "critical to the provision of local service."[35/] The Commission also concluded that the failure to have access to the ILECs' directory assistance would not only impair, but would "*significantly* impair" competitors' ability to provide service.[36/] Access to directory assistance services is so crucial that Congress even included it in the "competitive checklist" that an RBOC must satisfy before being allowed to provide in-region interLATA services under Section 271.[37/]

Metro One requests that the definition of Section 51.319(g), concerning operator services and directory assistance, should be modified as follows:

> An incumbent shall provide access to operator service and directory assistance facilities where technically feasible. Providing access to directory assistance facilities shall include providing directory assistance listings in batch format via magnetic tape or other electronic data mover means.

34/ *Notice* ¶ 33.

35/ *Interconnection Decision* ¶ 540.

36/ *Id.* (emphasis added).

37/ *See* 47 U.S.C. § 271(c)(2)(B)(vii).

This proposed definition is consistent with Commission precedent. Specifically, the Commission has already interpreted the meaning of access to telephone numbers, operator services, directory assistance and directory listings in the context of the dialing parity requirement set forth in Section 251(b)(3) of the 1996 Act. The Commission ruled that LECs "must provide directory listings to competing providers in readily accessible magnetic tape or electronic formats in a timely fashion upon request. A LEC must also permit competing providers to have access to and read the information in the LEC's directory assistance databases."[38/] The Commission's requirement of "readily accessible formats" is designed to "ensure that no LEC, either inadvertently or intentionally, provides subscriber listings in formats that would require the receiving carriers to expend significant resources to enter the information into its systems."[39/] The same concerns exist in the network elements context. Thus, adopting Metro One's proposed definition is consistent with the Commission's requirements in the dialing parity context and is warranted under the reasoning previously articulated by the Commission.

F. Modifications of Unbundling Requirements May be Granted Only in Limited Circumstances and Only by the Commission

The Commission seeks comment on whether it should adopt a mechanism by which network elements would no longer have to be unbundled at a future date, and under what circumstances such a determination should be made. Metro One believes that it is reasonable for the Commission to have the authority to remove specific network elements from unbundling requirements.

38/ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Second Report and Order and Memorandum Opinion and Order*, 1996 FCC Lexis 4311 (rel. Aug. 8, 1996).

39/ *Id.* ¶ 141.

Parties should be able to petition the Commission to have an element removed from the unbundling requirement. In the case of a RBOC, no request for removal of a network element should be considered until after Section 271 authority has been obtained by the applicable RBOC in the applicable jurisdiction. The Commission should remove a network element only if it determines, after considering the interests of all of the parties currently involved and the potential future implications, that it is in the best interest of all parties to remove the element from the unbundling requirements. The burden must be on the ILEC to establish that it will be in the best interests of all parties (*e.g.*, the ILEC, competitors, and consumers) to remove the element, and that the public interest requires removal.

Neither Section 251(d)(2) nor any other provision of the 1996 Act provide the Commission with the authority to delegate to the states responsibility for removing network elements from any unbundling requirements. As Metro One has demonstrated, national unbundling rules are required, and removing network elements should remain the sole authority of the Commission. Congress already specified the limited instances in which states may alter the network elements rules -- the authority to grant exemptions, suspensions and modifications for rural telephone companies under Sections 251(f)(1) and (f)(2), and the ability under Section 251(d)(3) to enforce additional requirements consistent with Section 251(c)(3).

Thus, if Congress wanted to permit states to remove the basic network elements at states' discretion, it would have provided for such authority in the 1996 Act. As Congress has already delineated the limited authority of states to modify the network elements requirements, the Commission should not now alter Congress's decision. The Commission is not authorized to delegate the responsibility for removing

network elements from unbundling requirements, and doing so would be a step backward in the implementation of the 1996 Act.

G. The Determination of a Network Element's Competitive Market Must be Carefully Considered

Finally, the Commission seeks comment on whether the existence of a competitive market for a network element is necessary to demonstrate that an element is sufficiently available outside the incumbent's network so that failure of the incumbent to provide the element would not be "necessary" or would not "impair" a carrier's ability to provide service.

Metro One believes that the existence of a competitive market could be evidence that an element is sufficiently available outside the incumbent's network and the failure of the incumbent to provide the element would not be "necessary" or would not "impair" a carrier's ability to provide service. However, the determination of whether the market is *truly* competitive must be carefully considered.

At some future point it may appear that there is a competitive market in the operator services and DA market. However, that situation only will exist because the incumbents were forced to provide their DA listings to the competitive DA providers in the first place. In this situation, if the DA market is truly competitive, the ILECs may not need to be required -- at some future point -- to provide DA services as a network element as long as they continue to make their DA listings available to the competitive providers consistent with the terms and conditions of the 1996 Act.

III. CONCLUSION

WHEREFORE, for the foregoing reasons, Metro One respectfully requests that the Commission reaffirm that directory assistance and access to directory assistance

databases are network elements that ILECs must provide under Section 251(c)(1), and that the Commission take such other actions as are consistent with these comments.

Respectfully submitted,

METRO ONE TELECOMMUNICATIONS, INC.

Its Attorneys

By: 

Michelle W. Cohen
Paul, Hastings, Janofsky
& Walker LLP
1299 Pennsylvania Ave, N.W.
Tenth Floor
Washington, D.C. 20004
(202) 508-9500

Lonn Beedy
Metro One Telecommunications, Inc.
8405 S.W. Nimbus Avenue
Beaverton, OR 97008-7159
(503) 643-9500

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